

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TARENCE J. EVANS,

Defendant-Appellee.

UNPUBLISHED

February 28, 2003

No. 235982

Wayne Circuit Court

LC Nos. 00-014015-01;

00-014066-01

Before: Kelly, P.J. and White and Hoekstra, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted the sentences imposed on defendant's two plea-based convictions of armed robbery, MCL 750.529. We vacate those sentences and remand for resentencing on those convictions only. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In Wayne Circuit Court Docket No. 00-014015-01, defendant was charged with armed robbery and possession of a firearm during the commission of a felony, MCL 750.227b, resulting from the robbery at gunpoint of an insurance agent. In Wayne Circuit Court Docket No. 00-104066-01, defendant was charged with armed robbery, felony-firearm, felon in possession of a firearm, MCL 750.224f, and resisting and obstructing a police officer, MCL 750.479, resulting from the robbery of a woman at gunpoint and an attempt to escape from the police. In each case the prosecution served notice that it would seek enhancement of defendant's sentence under the third habitual offender statute, MCL 769.11.

After evaluating the cases pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), the trial court indicated its inclination to sentence defendant to a term of three years and five months' to fifteen years' imprisonment on each count of armed robbery, in addition to two years' imprisonment on each count of felony-firearm, if defendant entered pleas to those charges.¹ In Docket No. 00-014015-01, defendant pleaded guilty to armed robbery and felony-firearm. In Docket No. 00-014066-01, defendant pleaded nolo contendere to armed robbery,

¹ The sentencing information report prepared for each case indicates that the minimum term range for each count of armed robbery was 108 to 270 months.

felony-firearm, and resisting and obstructing a police officer. In each case, defendant acknowledged that he had two prior felony convictions.

In Docket No. 00-014015-01, the trial court sentenced defendant to three years and five months' to fifteen years' imprisonment for the conviction of armed robbery and a consecutive two-year term for the conviction of felony-firearm. In Docket No. 00-014066-01, the trial court sentenced defendant to concurrent terms of three years and five months' to fifteen years' imprisonment for the conviction of armed robbery, one to four years' imprisonment for the conviction of resisting and obstructing a police officer, and a consecutive two-year term for the conviction of felony-firearm. The trial court did not articulate any reasons for departing below the sentencing guidelines for armed robbery.

The prosecution argues that defendant must be resentenced on his convictions of armed robbery² because the trial court failed to state on the record substantial and compelling reasons for departing below the sentencing guidelines range of 108 months to 270 months for those offenses. MCL 769.34(11). We agree, vacate defendant's sentences for armed robbery, and remand for resentencing on those convictions only. We review an issue concerning the proper application of the statutory sentencing provisions on a de novo basis. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).³

A trial court must impose a sentence within the calculated guidelines range, MCL 769.34(2), but may depart from the guidelines if it finds that a substantial and compelling reason exists to do so. The trial court must state the reason on the record. MCL 769.34(3). To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). A trial court's preliminary evaluation of a case does not limit the trial court's sentencing discretion. *Cobb*, *supra* at 283.

Here, the trial court stated no reasons for departing downward from the guidelines when it imposed sentence for defendant's convictions of armed robbery. If the trial court determined that it was not required to articulate reasons for its sentencing decision because the sentences resulted from a *Cobbs* evaluation, it erred in so concluding. *Hegwood*, *supra*. Therefore, resentencing is required on defendant's convictions of armed robbery. If on resentencing the trial court determines that there are substantial and compelling reasons for departure, then the trial court shall state those reasons on the record. If the trial court determines that imposition of the same sentences would be inappropriate because substantial and compelling reasons do not exist for departing below the guidelines, defendant must be given the opportunity to withdraw his pleas to those charges.⁴ *Cobbs*, *supra* at 283.

² The prosecution does not object to the sentence for the conviction of resisting and obstructing a police officer. The two-year sentence imposed on each conviction of felony-firearm is mandated by statute. MCL 750.227b.

³ Because the offense occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

⁴ Because it is unclear from the record before us whether defendant's pleas to resisting and obstructing a police officer and the two counts of felony-firearm were conditioned on the *Cobbs* (continued...)

Defendant's assertion that resentencing is not required because his sentences are proportionate to his circumstances and those of the offense is without merit. The relevant test is whether the trial court had substantial and compelling reasons to depart from the guidelines. MCL 769.34(11). We may consider the principle of proportionality set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) only in the context of reviewing the extent of a departure from the guidelines. *People v Babcock (After Remand)*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002).

Vacated in part and remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Joel P. Hoekstra

(...continued)

sentence agreement, we take no position on whether defendant would be entitled to have those pleas withdrawn also if the trial court determines that imposition of the same sentences for the armed robbery convictions would be inappropriate.